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12 UNITED STATES DISTRICT COURT

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14 SOUTHERN DISTRICT OF CALIFORNIA

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16 **(HONORABLE JEFFREY T. MILLER)**

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1 review under § 1326(d). *See United States v. Camacho-Lopez*, 450 F.3d 928, 930 (9th Cir. 2006). Likewise,
 2 the government does not dispute that, if Mr. Heron-Salinas had not committed an aggravated felony, he was
 3 clearly prejudiced by his removal on that basis. *See id.* Thus, the only dispute between the parties in
 4 connection with this motion is whether Mr. Heron-Salinas's alleged § 245(a) conviction is a crime of violence
 5 as that term is defined in 18 U.S.C. § 16.

6 A § 245(a) conviction is not categorically a crime of violence. Rather, the statute is categorically
 7 overbroad because: (1) it encompasses reckless and negligent, as well as intentional, conduct; and (2) it may
 8 be based on the "least touching" of the victim rather than the requisite use of "force." Neither has the
 9 government established that Mr. Heron-Salinas's alleged conviction is a crime of violence under the modified
 10 categorical approach. The only judicially noticeable documents submitted by the government show that Mr.
 11 Heron-Salinas's alleged conviction was based on a *People v. West* plea. As the Ninth Circuit has recently
 12 made clear, however, such a plea does not admit the factual allegations in the charging document, or indeed
 13 admit any specific details about the charged conduct. Accordingly, the modified categorical approach does
 14 not add anything to the categorical analysis, or establish that Mr. Heron-Salinas's alleged conviction was
 15 necessarily a generic crime of violence. This Court should therefore grant Mr. Heron-Salinas's motion, and
 16 dismiss the indictment due to an invalid deportation.

17 **II.**

18 **CALIFORNIA ASSAULT WITH A FIREARM**

19 **IS NOT CATEGORICALLY A CRIME OF VIOLENCE**

20 An aggravated felony is defined by the Immigration and Nationality Act to include a "crime of
 21 violence" under 18 U.S.C. § 16. *Lara-Cazares v. Gonzales*, 408 F.3d 1217, 1219 (9th Cir. 2005) (citing §
 22 8 U.S.C. § 1101(a)(43)(F)). Section 16, in turn, defines "crime of violence" as "(a) an offense that has as an
 23 element the use, attempted use, or threatened use of physical force against the person or property of another,
 24 or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force
 25 against the person or property of another may be used in the course of committing the offense." 18 U.S.C.
 26 § 16.

27 To determine whether a prior conviction meets this definition, this Court must employ the
 28 "categorical" approach adopted in *United States v. Taylor*, 495 U.S. 575 (1990). *See United States v.*

1 *Lopez-Montanez*, 421 F.3d 926, 929 (9th Cir. 2005). Under this approach, courts “look only to the fact of
 2 conviction and the statutory definition of the prior offense,’ not to the underlying facts.” *Id.* at 929 (quoting
 3 *Taylor*, 495 U.S. at 602). “If the state statute criminalizes conduct that is not a crime of violence ..., then [the]
 4 conviction is not a categorical match.” *United States v. Wenner*, 351 F.3d 969, 972 (9th Cir. 2003). Rather,
 5 a prior conviction qualifies as a crime of violence “if and only if the ‘full range of conduct’ covered by it falls
 6 within the meaning of that term.” *United States v. Baron-Medina*, 187 F.3d 1144, 1146 (9th Cir. 1999)
 7 (internal citation omitted). Notably, although a “theoretical possibility” of such overbreadth is insufficient,
 8 where a statute “explicitly defines a crime more broadly than the generic definition, no ‘legal imagination,’
 9 ..., is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls
 10 outside the generic definition of the crime.” *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (*en*
 11 *banc*) (quoting *Gonzalez v. Duenas-Alvarez*, 127 S.Ct. 815, 822 (2007)).

12 Here, the government cannot establish that California assault with a firearm is categorically a crime
 13 of violence. A superficial look at the statute may suggest, as the government argues, that the offense seems
 14 violent. In fact, however, the statute is categorically overbroad because: (1) it encompasses actions that are
 15 negligent or reckless and performed without specific intent; and (2) it may be based on the “least touching”
 16 of the victim rather than the requisite use of force.

17 A. **Cal. Penal Code § 245 Does Not Have the Requisite Mens Rea**

18 California Penal Code § 245 is categorically overbroad because it encompasses reckless and negligent,
 19 as well as intentional, conduct. Under *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004), the Supreme Court interpreted
 20 § 16 to require the active employment of force, which requires “a higher degree of intent than negligent or
 21 merely accidental conduct.” *See Lara-Cazares*, 408 F.3d at 1220. This requirement applies with equal force
 22 to both § 16(a) and § 16(b). *See id.* (quoting *Leocal*, 543 U.S. at 9) (“[W]e must give the language in § 16(b)
 23 an identical construction, requiring a higher mens rea than the merely accidental or negligent conduct ...”).

24 Moreover, as the Ninth Circuit has clarified, a reckless mens rea is also insufficient. In *Fernandez-*
 25 *Ruiz v. Gonzales*, 466 F.3d 1121, 1125 (9th Cir. 2006) (*en banc*), the court considered an Arizona statute
 26 which defined assault as the intentional, knowing, or reckless causing of physical injury to another person.
 27 The Arizona statutes defined recklessness as “consciously disregarding a substantial and unjustifiable risk that
 28 the result will occur or the circumstances exist.” *Id.* at 1130. The *en banc* court held that, under *Leocal*, “the

1 reckless use of force is ‘accidental’ and crimes of recklessness cannot be crimes of violence.” *Id.* Likewise,
 2 in *United States v. Narvaez-Gomez*, 489 F.3d 970, 977 (9th Cir. 2007), the court held that discharging a
 3 firearm at an inhabited dwelling, in violation of Cal. Penal Code § 246, is not a categorical crime of violence.
 4 The court emphasized that § 246 required a “conscious indifference” intent element which was equivalent to
 5 recklessness. *See id.* at 976. Because violation of § 246 could result from purely reckless conduct, the offense
 6 could not constitute a categorical crime of violence. *See id.* at 977.

7 Cal. Penal Code § 245 suffers from the same deficiencies. Section 245(a)(2) prohibits “an assault
 8 upon the person of another with a firearm.” Assault, in turn, is defined as “an unlawful attempt, coupled with
 9 a present ability, to commit a violent injury on the person of another.” Cal. Penal Code § 240. However,
 10 § 245 does not require specific intent to cause injury, or even a subjective awareness that such injury might
 11 occur. *People v. Williams*, 26 Cal. 4th 779, 788, 790 (2001). Rather, § 245 requires only a “conscious
 12 disregard” or “reckless disregard” of the probable consequences. *Williams*, 26 Cal. 4th at 790; *People v.*
 13 *Griggs*, 265 Cal. Rptr. 53, 57 (1989). Under *Fernandez-Ruiz* and *Narvaez-Gomez*, such a mens rea is
 14 equivalent to recklessness, and does not suffice to establish a categorical crime of violence. *See Fernandez-*
 15 *Ruiz*, 466 F.3d at 1130; *Narvaez-Gomez*, 489 F.3d at 976-77.

16 Moreover, because the crime of assault addresses conduct “based on what *might* have happened – and
 17 not what *actually* happened – the mental state for assault incorporates the language of probability, i.e., direct,
 18 natural, and probable consequences.” *Williams*, 26 Cal. 4th at 787 (emphasis in original). The test is
 19 *objective* rather than *subjective*: to be convicted of assault, “a defendant must be aware of the facts that would
 20 lead a reasonable person to realize that a battery would directly, naturally and probably result from his
 21 conduct.” *Id.* at 788. Thus, although the defendant’s *acts* must be intentional, the application of the use of
 22 force and the resulting battery need not be. Rather, even if a defendant “honestly believes that his act was not
 23 likely to result in a battery[,] [he] is still guilty of assault if a reasonable person, viewing the facts known to
 24 defendant, would find that the act would directly, naturally and probably result in a battery.” *Id.* at 788 n.3.

25 In *Williams*, the California Supreme Court explicitly acknowledged that assault arguably encompassed
 26 a reckless or even lesser mental state. The court noted that “mere recklessness or criminal negligence is still
 27 not enough,” but only in the sense that “a jury cannot find a defendant guilty of assault based on facts he
 28 should have known but did not know.” *Id.* at 788. The court further clarified that prior caselaw, which held

1 that reckless conduct cannot constitute an assault, “meant ‘recklessness’ in its historical sense as a synonym
 2 for criminal negligence, rather than its more modern conception as a subjective appreciation of the risk of
 3 harm to another.” *Id.* at 788 n.4. Because, as the court made clear, assault does not require even a subjective
 4 appreciation of the risk of harm, *see id.* at 788 n.3, the mental state for assault is below even recklessness.
 5 Thus, the natural and probable consequences standard “arguably implies an objective mental state consistent
 6 with a negligence standard.” *Id.* at 787.

7 Subsequent caselaw has made it clear that assault does, in fact, encompass a negligent mental state.

8 In *People v. Wright*, 100 Cal. App. 4th 703, 712 (2002), the California Court of Appeal noted that
 9 “[r]ecklessness requires a subjective awareness of the risk of harm,” while “[n]egligence requires an objective
 10 view of the risk of harm. ‘The facts must be such that the ... consequence of the negligent act could reasonably
 11 have been foreseen.’” As the court explained:

12 By construing assault as intentional conduct involving an objective risk of harm, *Williams*
 13 defines the mental state by a negligence standard. *Williams* acknowledges the objective test
 14 of probable consequences arguably implies an objective mental state consistent with a
 negligence standard.

15 *Id.* at 712. The *Wright* court further found that the mental state enunciated in *Williams* was equivalent to
 16 criminal negligence, *i.e.*, “whether a reasonable person in defendant’s position would have been aware of the
 17 risk involved.” *Id.* The court noted that, under CALJIC 9.00, “the jury was permitted to convict defendant
 18 of assault if it determined, under an objective view of the facts, that an application of physical force on another
 19 person was reasonably foreseeable.” *Id.* at 724. Nonetheless, in affirming the defendant’s conviction for
 20 assault with a deadly weapon in violation of Cal. Penal Code § 245, the court found that the defendant in that
 21 case was “properly convicted of a negligent assault on the facts of the case.” *Id.* at 706 (emphasis added).
 22 Thus, § 245 regulates criminally negligent conduct, which falls outside the categorical definition of a crime
 23 of violence.

24 The government concedes that California law does not require proof that a defendant intended to cause
 25 injury, but argues this is irrelevant to the analysis under § 16. (Gov’t Opp. at 8-9). To the contrary, as the
 26 Ninth Circuit made clear in *Fernandez-Ruiz*, a statute which encompasses “recklessly causing ... physical
 27 injury to another person” is not a categorical crime of violence. 466 F.3d at 1126 (quoting Ariz. Rev. Stat.
 28 § 13-1203(A)(1)). Likewise, in *Narvaez-Gomez*, the court held that discharging a firearm with “conscious

1 indifference to the probable consequence[s]" incorporates a recklessness standard, and does not categorically
 2 constitute a crime of violence. 489 F.3d at 976-77. An offense under § 245, which encompasses conscious
 3 disregard of the probable consequences, *Williams*, 26 Cal. 4th at 790, or even negligence, *Wright*, 100 Cal.
 4 App. 4th at 706, has the same mental state. Thus, as in *Narvaez-Gomez*, the offense is not categorically a
 5 crime of violence.

6 The government also argues that it is impossible to commit the offense of assault with a deadly
 7 weapon without creating a substantial risk of using physical force under § 16(b). (Gov't Opp. at 9.) However,
 8 as the Ninth Circuit has made clear, the intent requirement applies equally to § 16(a) and § 16(b). *Lara-*
9 Cazares, 408 F.3d at 1220. Because § 245 requires no subjective awareness of the risk of force, but is rather
 10 satisfied by recklessness or even negligence, it does not categorically satisfy § 16(b).

11 The government also argues throughout its opposition that § 245 requires "intentional" or "willful"
 12 conduct. The critical point, however, is that § 245 requires an intentional *act* but not an intentional *use of*
 13 *force*. Rather, a person may be convicted of an assault by willfully committing an act "which by its nature
 14 would probably and directly result in the application of physical force on another person." Cal. Jury Instr.
 15 9.00 (emphasis added). As the California courts have made clear, such a standard does not require the
 16 defendant to intend, or even be aware, that his actions will result in the application of physical force, but rather
 17 encompasses recklessness or even negligence. *See Williams*, 76 Cal. 4th at 788 & n.3; *Wright*, 100 Cal. App.
 18 4th at 706, 712. Such a standard simply does not satisfy the intent requirement of § 16.

19 **B. Cal. Penal Code § 245 Does Not Require Use of Force**

20 Section 245 is also not a crime of violence because it may be based on the "least touching" of the
 21 victim. In California, "[a]n assault includes an unconsented touching of the victim." *People v. Rosen*, 56 Cal.
 22 Rptr. 3d 444, 453 (2007) (citing 1 Witkin & Epstein, *Cal. Criminal Law*, Crimes Against the Person, §§ 1-2,
 23 at 638-39 (3d ed. 2000)). In fact, California courts have described the "force" necessary for an assault as "the
 24 least touching" of another. *See People v. Rocha*, 3 Cal. 3d 893, 899 (1971) ("A battery must be contemplated,
 25 but only an 'injury' as that term is used with respect to a battery need be intended. 'It has long been
 26 established, both in tort and criminal law, that the *least touching* may constitute battery. In other words, force
 27 against the person is enough, it need not be violent or severe, it need not cause bodily harm or even pain, and
 28 it need not leave any mark'"') (emphasis added); *see also id.* at 900 ("The violent injury here mentioned is not

1 synonymous with bodily harm, but includes any wrongful act committed by means of physical force against
 2 the person of another, even although only the feelings of such person are injured by the act") (quoting *People*
 3 *v. Bradbury*, 151 Cal. 675, 676-77 (1907)); *People v. Colantuono*, 7 Cal. 4th 206, 214 n.4 (1994) (quoting
 4 the former passage in *Rocha*, and stating, “[a]ccordingly, references throughout this opinion to ‘violent injury’
 5 or ‘violent-injury-producing’ acts should be understood in light of this explication”). Thus, as an assault
 6 under § 245(a)(2) may be based on the “least touching” of the victim, the offense does not involve an element
 7 of force as described in § 16.

8 *Ortega-Mendez v. Gonzales*, 450 F.3d 1010 (9th Cir. 2006), is consistent with that analysis. In that
 9 case, the Ninth Circuit held that battery under Cal. Penal Code § 242 “is not categorically a ‘crime of
 10 violence’ within the meaning of 18 U.S.C. § 16(a).” *Id.* at 1020. The court noted that the statutory definition
 11 of battery included “any willful and unlawful use of force or violence upon the person of another.” *Id.* at
 12 1016 (quoting Cal. Penal Code § 242). The court explained, however, that the phrase “use of force or
 13 violence” in California “is a term of art, requiring neither a force capable of hurting or causing injury nor
 14 violence in the usual sense of the term.” *Id.* Indeed, citing and quoting some of the § 245 cases above, such
 15 as *Colantuono* and *Rocha*, the court concluded that the “force or violence” contemplated for battery included
 16 the “least touching” of the victim, *id.* at 1017, and “encompassed mere offensive touching.” *Id.* at 1019 (citing
 17 *Rocha*, 3 Cal. 3d at 899 n.12). In contrast, “the force necessary to constitute a crime of violence [under § 16]
 18 must actually be violent in nature.” *Id.* at 1016 (quoting *Singh v. Ashcroft*, 386 F.3d 1228, 1233 (9th Cir.
 19 2004)). Thus, because California battery involves mere “offensive touching,” conduct that is not “violent in
 20 nature,” *Ortega-Mendez* held that it does not have the element of force contemplated by § 16.

21 Likewise, assault under § 245 does not have the element of force required by § 16. Although the
 22 California assault statute contains the slight different language of “violent injury,” *see* Cal. Penal Code § 240,
 23 *Rocha* and *Colantuono* – cases interpreting § 245 – specifically define “violent injury” as that which would
 24 constitute a battery. *Rocha*, 3 Cal. 3d at 899 (“only an ‘injury’ as that term is used with respect to a battery
 25 need be intended”); *Colantuono*, 7 Cal. 4th at 214 n.4 (quoting *Rocha*, and stating, “[a]ccordingly, references
 26 throughout this opinion to ‘violent injury’ or ‘violent-injury-producing’ acts should be understood in light of
 27 this explication”). Thus, *Ortega-Mendez* controls because the “force” necessary for a battery is the force

1 necessary for an assault. Each “need not be violent or severe,” and both contemplate only “the least
2 touching” of another. *Rocha*, 3 Cal. 3d at 899 n.12.

Indeed, the Ninth Circuit has previously held that similar “touching” does not constitute a crime of violence. *See United States v. Lopez-Montanez*, 421 F.3d 926 (9th Cir. 2005). In *Lopez-Montanez*, the court declared that California’s sexual battery statute is not categorically a crime of violence, in part because the statute does not involve the use of force. *See id.* at 929. The court explained that ““the force necessary to constitute a crime of violence [] must actually be violent in nature.”” *Id.* (quoting *Ye v. INS*, 214 F.3d 1128, 1133 (9th Cir. 2000)). The sexual battery statute, however, attached liability for any physical contact with the skin of another person. Thus, because the “touching may be ‘ephemeral,’ or committed without the use of force,” *id.*, the sexual battery statute was not a crime of violence. The same analysis applies to § 245, because the force necessary to constitute the assault “need not be violent or severe” and contemplates “the least touching” of another. *Rocha*, 3 Cal. 3d at 899 n.12.

III.

MR. HERON-SALINAS'S ALLEGED CONVICTION IS NOT A CRIME OF VIOLENCE

UNDER THE MODIFIED CATEGORICAL APPROACH

16 The modified categorical approach does nothing to change the above analysis. “In a ‘narrow range
17 of cases’ in which the statute criminalizes conduct that would not constitute a [predicate] offense, *Taylor*
18 endorsed a modified categorical approach under which the court can examine ‘documentation or judicially
19 noticeable facts that clearly establish that the conviction is a predicate conviction for enhancement purposes.’”
20 *United States v. Navidad-Marcos*, 367 F.3d 903, 908 (9th Cir. 2004) (internal citations omitted). The
21 government “has the burden to establish clearly and unequivocally the conviction was based on all of the
22 elements of a qualifying predicate offense.” *Id.* Moreover, where an alleged conviction rests on a guilty plea
23 rather than a jury verdict, the record must confirm “that the plea “‘necessarily’ rested on the fact identifying
24 the [offense] as generic.”” *United States v. Vidal*, 504 F.3d 1072, 1086 (9th Cir. 2007) (internal quotations
25 omitted).

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1 Here, the only two judicially noticeable documents before the Court are the Information and the
 2 transcript of the plea colloquy.¹ The government contends that those documents establish that Mr. Heron-
 3 Salinas admitted to a “willful” assault. In particular, the government notes that the Information alleges that
 4 the assault was committed “willfully,” and alleged various enhancements. The Information, however, does
 5 not establish the facts of Mr. Heron-Salinas’s alleged conviction. “[L]ike any charging document, the
 6 information is insufficient alone to prove the facts to which [the defendant] admitted.” *United States v.*
 7 *Snellenberger*, 493 F.3d 1015, 1019 (9th Cir. 2007). In any event, as discussed above, a “willful” or
 8 “intentional” assault does not establish, as required by § 16, that the application of the use of force or the risk
 9 of injury was willful or intentional.

10 The government also relies on the plea colloquy, in which Mr. Heron-Salinas’s counsel stipulated that
 11 there was a factual basis for the plea. Again, however, and as the government concedes, there was no specific
 12 discussion regarding the factual basis. In particular, neither Mr. Heron-Salinas nor his counsel ever admitted
 13 guilt to “the critical phrase ‘as charged in the Information.’” *Vidal*, 504 F.3d at 1087. The plea “does not,
 14 therefore, establish that [Mr. Heron-Salinas] admitted to all, or any, of the factual allegations” in the charging
 15 document. *Id.* Accordingly, there is simply no basis for the government’s conclusion that Mr. Heron-Salinas
 16 admitted to “willful” conduct.

17 Moreover, the plea colloquy shows that Mr. Heron-Salinas entered a no contest plea pursuant to
 18 *People v. West*, 477 P.2d 409 (Cal. 1970). See Govt. Exh. 2, Transcript of Plea Colloquy, at p.8. A *People*
 19 *v. West* plea is “a plea of nolo contendere that does not establish factual guilt.” *Vidal*, 504 F.3d at 1089. In
 20 addition, in the context of a *West* plea, “[a] court is not limited to accepting a guilty plea only to the offense
 21 charged but can accept a guilty plea to any reasonably related lesser offense.” *Id.* at 1087-88 (citing California
 22 caselaw). Thus, “we have no way of knowing what conduct [the defendant] admitted when he pled guilty to
 23 conduct that was not identical to that charged in Count One of the Complaint.” *Id.* at 1088. Rather, by
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25 ¹ In its original opposition papers, the government also submitted the abstract of judgment relating
 26 to the alleged § 245(a) conviction, as well as a Presentence Report in an unrelated case. As the government
 27 concedes, the abstract of judgment cannot be considered under the modified categorical approach. See
 28 *United States v. Snellenberger*, 493 F.3d 1015, 1020 (9th Cir. 2007), cited in Govt’s Suppl. Response at 3
 n.1. Likewise, a federal Presentence Report purporting to summarize the facts of an alleged conviction
 cannot be considered. See *United States v. Vidal*, 504 F.3d 1072, 1087 n.25 (9th Cir. 2007). Mr. Heron-
 Salinas therefore objects to the Court’s consideration of these documents.

1 entering a *West* plea, a defendant “[does] not admit the specific details about his conduct on the ... counts [to
 2 which] he pled guilty.” *Id.* at 1089. Thus, by entering a *West* plea, Mr. Heron-Salinas did not admit any
 3 factual allegations against him, much less the specific allegation that his conduct was willful.

4 Finally, the government notes that Mr. Heron-Salinas admitted “use” of a firearm and agreed to pay
 5 victim restitution. In the context of a *West* plea, however, admission of use of a firearm does not establish
 6 that such use was “intentional” as defined in Cal. Jury Instr. Crim. 17.19, because the defendant did not admit
 7 to any specific factual allegations supporting that enhancement. In any event, as discussed above, there has
 8 been no showing that Mr. Heron-Salinas intended to apply the use of force or intended a resulting injury.
 9 Likewise, defense counsel’s agreement not to dispute the victim’s claimed restitution does not establish any
 10 factual admissions surrounding this offense. Accordingly, the modified categorical approach does not
 11 establish that Mr. Heron-Salinas’s alleged § 245(a) conviction is “necessarily” a crime of violence.

12 **IV.**

13 **CONCLUSION**

14 For the foregoing reasons, Mr. Heron-Salinas respectfully requests that the Court grant his motion to
 15 dismiss the indictment due to an invalid deportation.

16 Respectfully submitted,

17
 18 DATED: February 29, 2008

/s/ Jennifer L. Coon
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CERTIFICATE OF SERVICE

Counsel for Defendant certifies that the foregoing pleading is true and accurate to the best of her information and belief, and that a copy of the foregoing document has been served this day upon:

Courtesy Copy Court

Copy Assistant U.S. Attorney via ECF Notice of Electronic Filing

Dated: February 29, 2008

/s/ Jennifer L. Coon
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